Supreme Court of the United States

October Term, 1976

No. 75-6933

NATHANIEL BROWN,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

I. Whether a municipal court conviction for the *misdemeanor* of operating a motor vehicle without the consent of the owner in one county and a subsequent conviction, in a different county, for the *felony* of auto theft, committed nine days earlier than the *misdemeanor* offense, places a defendant twice in jeopardy for identical offenses violating the "same evidence" test of the Double Jeopardy and Due Process Clauses of the Constitution of the United States?

II. Whether the Fifth Amendment Double Jeopardy Clause of the United States Constitution requires that the defendant be tried only once for all separate offenses arising from a course of criminal conduct which may form a single transaction?

STATEMENT OF THE CASE

On November 29, 1973 an automobile belonging to Gloria Ingram was stolen by Petitioner-Appellant, Na-

thaniel Brown, from a parking lot in *Cuyahoga County*, Ohio. Nine days later, on December 8, 1973, Brown was arrested in a different county of Ohio, Lake County, and charged with the misdemeanor of operating a motor vehicle without the owner's consent in violation of Ohio Revised Code, Section 4549.04(D) (repealed 1/1/74). Two days later, on December 10, 1973, Brown plead guilty to this misdemeanor offense in the Willoughby Municipal Court of *Lake County* and was immediately sentenced to thirty days in the Lake County Workhouse and fined $100 and costs. The record reveals no reason for the *Lake County* prosecuting authorities to contact the *Cuyahoga County* authorities with respect to Brown.[1] Neither does the record reveal any communication between the prosecuting authorities in *Lake County* and prosecuting authorities in *Cuyahoga County* concerning Brown or the motor vehicle in question.

On February 5, 1974, the *Cuyahoga County Grand Jury* indicted Brown charging him with the auto theft of Ingram's automobile on November 29, 1973, in violation of Ohio Revised Code, Section 4549.04(A). The vehicle involved in the *Cuyahoga County felony indictment for*

1. For example, if the record before this Court and before the Ohio Court of Appeals established that Brown himself was a resident of *Cuyahoga County* or that Brown frequently entered *Cuyahoga County*, then the record might establish reasonable grounds for the *Lake County* authorities to contact the *Cuyahoga County* authorities with respect to the arrest of Brown for operating Ingram's automobile without the owner's consent. Since there is no basis in the record, either before this Court or the Ohio Court of Appeals, to believe that the *Lake County* authorities should have reasonably foreseen a connection between their arrest of Brown and possible previous offenses by Brown in *Cuyahoga County*, this Court must conclude that the *Lake County* authorities acted reasonably and fairly by accepting Brown's plea of guilty to a misdemeanor without first communicating with the prosecuting authorities in *Cuyahoga County*. Compare, *Ciucci v. Illinois*, 356 U.S. 571, 573 (1958) (". . . material not being part of the record, and not having been considered by the State courts, may not be considered here.")

auto theft was the same vehicle implicated in Brown's misdemeanor conviction in *Lake County for operating a vehicle without the owner's consent.*

In the *Cuyahoga County* Common Pleas Court Brown plead guilty to the felony offense of auto theft, and his subsequent motion to withdraw this plea on grounds of double jeopardy was overruled on November 26, 1974. Brown was sentenced to six months in the Cuyahoga County Jail, his sentence was suspended, and he was placed on probation for one year.

Brown appealed his *Cuyahoga County felony conviction for auto theft* to the Ohio Court of Appeals, charging that his felony conviction violated the Constitutional prohibition against Double Jeopardy because it was based on the same acts which gave rise to his *prior misdemeanor conviction* in the *Lake County* Municipal Court. The Court of Appeals, employing the Double Jeopardy analysis enunciated in *Blockburger v. United States*, 284 U.S. 299 (1932),[2] and *State v. Best*, 42 Ohio St. 2d 530 (1975), affirmed Brown's conviction.

On March 19, 1976 the Supreme Court of Ohio, exercising its discretion under Ohio Law, denied Brown's petition for review, and the United States Supreme Court granted certiorari on October 18, 1976.

SUMMARY OF ARGUMENT

The State of Ohio urges this Court to find that a defendant who plead guilty to the misdemeanor of operating a motor vehicle without the consent of the owner in one county and was subsequently convicted in a different county for the felony of auto theft which was com-

2. See also, *Gavieres v. United States*, 220 U.S. 338, 342 (1911), and the decision of the Ohio Court of Appeals, Appendix page 21.

mitted nine days earlier than the misdemeanor offense does not place a defendant twice in jeopardy and does not violate the Double Jeopardy Clause of the Constitution of the United States. The Double Jeopardy Clause bars multiple prosecutions for the "same offense." This standard is measured by the same evidence test enunciated by this Court's decisions in *Gavieres v. United States*, 220 U.S. 338 (1911) and *Blockburger v. United States*, 284 U.S. 299 (1932). These decisions require that courts examine whether each statutory offense with which the defendant is charged "requires proof of a fact which the other does not." The State of Ohio maintains that the felony auto theft statute (4549.04(A)) requires proof of an additional fact which is not present in the misdemeanor of operating a stolen motor vehicle (4549.04(D)). The State of Ohio also maintains that the crimes of auto theft and operating a stolen motor vehicle do not constitute a continuous offense in violation of the Double Jeopardy Clause as construed by *In Re Snow*, 120 U.S. 274 (1887).

The State of Ohio further urges this Court not to adopt the same transaction test advocated by the Petitioner. The same transaction test is not recognized as the standard for applying the Fifth Amendment Double Jeopardy Clause, and does not furnish a manageable judicial standard for the application of the Fifth Amendment Double Jeopardy Clause. The same transaction rule will unnecessarily burden trial courts by requiring extensive pretrial hearings on factual issues unrelated to guilt determining and will plague Federal Courts in habeas proceedings on issues unrelated to guilt determining.

Finally, Petitioner's argument that he is subjected to potentially excessive sentences for multiple prosecutions does not raise a Double Jeopardy Claim and is more appropriately covered by the Eighth Amendment prohibition against disproportionate sentencing.

ARGUMENT

I. A MUNICIPAL COURT CONVICTION FOR THE MISDEMEANOR OF OPERATING A MOTOR VEHICLE WITHOUT THE CONSENT OF THE OWNER IN ONE COUNTY AND A SUBSEQUENT CONVICTION, IN A DIFFERENT COUNTY, FOR THE FELONY OF AUTO THEFT, COMMITTED NINE DAYS EARLIER THAN THE MISDEMEANOR OFFENSE, DOES NOT PLACE A DEFENDANT TWICE IN JEOPARDY FOR IDENTICAL OFFENSES VIOLATING THE "SAME EVIDENCE" TEST OF THE DOUBLE JEOPARDY AND DUE PROCESS CLAUSES OF THE CONSTITUTION OF THE UNITED STATES.

(A) The Double Jeopardy Clause Prohibits Multiple Prosecutions for the "Same Offense." This Standard Is Measured by the Same Evidence Test of Blockburger v. United States, 284 U.S. 299, 304 (1932); and Gavieres v. United States, 220 U.S. 338 (1911) Which Demands That Courts Examine Whether Each Statutory Offense With Which the Defendant Is Charged "Requires Proof of a Fact Which the Other Does Not." The Court's Application of the Same Evidence Test Must Focus on the Statutory Elements of Each Offense.

The protection of an accused individual in a criminal proceeding under the Double Jeopardy prohibition of the Fifth Amendment is firmly rooted in the traditions of Anglo-American jurisprudence, *Green v. United States*, 355 U.S. 184 (1957). It has been deemed fundamental to our system of justice by this Court and thus applicable to the States via the Due Process clause of the Fourteenth

Amendment, *Benton v. Maryland,* 395 U.S. 784 (1969). In *United States v. Wilson,* 420 U.S. 332, 342-43 (1975) this Court classified the protection furnished by the Constitutional Rule prohibiting double jeopardy:

> "In *North Carolina v. Pearce,* 395 U.S. 711 (1969) we observed that the Double Jeopardy Clause provides three related protections:
>
> " 'It protects against a second prosecution for the same offense *after acquittal.* It protects against a second prosecution for the *same offense after conviction.* And it protects against multiple punishments for the *same offense.*' *Id.,* at 717." (Emphasis added.)

Brown's double jeopardy claims fall into the second category recognized in *Wilson* and *Pearce, supra,* i.e., "a second prosecution for the same offense after *conviction.*" The *Wilson* Court candidly expressed the constitutional interest underlying this protection:

> "When a defendant has been *once convicted* and punished *for a particular crime,* principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the *same offense. Ex parte Lange,* 18 Wall. 163 (1874); *In re Nielsen,* 131 U.S. 176 (1889)." See *Wilson, supra,* at 343. (Emphasis added.)

The interest protected under the "*second prosecution for the same offense after conviction*" species of double jeopardy cases collides head on with the State's important legitimate interest in punishing each violation of its unique, discrete criminal statutes. Therefore the United States Supreme Court has carefully and responsibly limited the scope of this category of double jeopardy claims to situations where the second prosecution is for an offense which

is the *SAME* as the first offense for which the defendant was convicted.[3] This Court, throughout a distinguished history of Nineteenth and Twentieth Century Double Jeopardy Jurisprudence has repeatedly held that by "*SAME* offense," it means two statutory crimes, the elements of which were, on their face, *LEGALLY IDENTICAL* to each other. The seminal case, which has withstood almost fifty years of Double Jeopardy adjudication and specific assaults on its validity,[4] is *Blockburger v. United States,* 284 U.S.

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3. This approach is consistent with the limited scope of the text of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, which pertinently provides:

> ". . . [N]or shall any person be subject for the *same offense* to be twice put in jeopardy."

4. In *Gore v. United States,* 357 U.S. 386 (1958) a federal defendant was convicted on six counts of violating three different sections of a federal law by a single sale of narcotics on two separate dates, two days apart. The defendant was sentenced to three consecutive terms for each day's sale, the prison terms for each day's sale were to run consecutively with those of the other day's sale. The High Court *rejected* the defendant's Double Jeopardy claim when it wrote:

> "We are strongly urged to reconsider *Blockburger* . . .
>
> . . . [W]e have had pressed upon us that the *Blockburger* doctrine offends the constitutional prohibition against double jeopardy. *If there is anything to this claim it surely has long been disregarded in decisions of this Court, participated in by judges especially sensitive* to the application of the historic safeguard of double jeopardy. In applying a provision like that of double jeopardy, which is rooted in history and is not an evolving concept like that of due process, a long course of adjudication in this Court carries impressive authority. Certainly if punishment for each of separate offenses as those for which the petitioner here has been sentenced, and not merely different descriptions of the same offense, is constitutionally beyond the power of Congress to impose, not only *Blockburger* but at least the following cases would also have to be overruled: *Carter v. McClaughry,* 183 U.S. 365; *Morgan v. Devine,* 237 U.S. 632; *Albrecht v. United States,* 273 U.S. 1; *Pinkerton v. United States,* 328 U.S. 640; *American Tobacco Co. v. United States,* 328 U.S. 781; *United States v. Michener,* 331 U.S. 789; *Pereira v. United States,* 347 U.S. 1." *Gore, supra* at 390, 392. (Emphasis added.)

299 (1932) in which this Court responsibly defined the term "same offense" when it wrote:

> "Each of the offenses created requires proof of a different element. The applicable rule is that *where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. Gavieres v. United States,* 220 U.S. 338, 342, and authorities cited. In that case this court quoted from and adopted the language of the Supreme Court of Massachusetts in *Morey v. Commonwealth,* 108 Mass. 433: A single act may be an offense against two statutues; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." See *Blockburger, supra,* at 304. (Emphasis added.)

In the earlier case of *Morgan v. Devine,* 237 U.S. 632 (1915) this Court, construing the meaning of the term "same offense" as it appears in the Double Jeopardy Clause of the Fifth Amendment wrote:

> "As to the contention of *double jeopardy* upon which the petition of habeas corpus is rested in this case, this court has settled that the *test of identity of offenses is whether the same evidence is required to sustain them*; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes. Without repeating the discussion, we need but refer to *Carter v. McClaughry,* 183 U.S. 365; *Burton v. United States,* 202 U.S. 344, 377, and the recent case of *Gavieres v. United States,* 220 U.S. 338." See *Morgan, supra,* at 641. (Emphasis added.)[5]

In order for the violation of discrete statutes to constitute punishment for the "same offense" within the meaning of the Double Jeopardy Clause, the elements of the two offenses must be legally identical, on their faces.[6] Thus the Court wrote in *Gavieres v. United States,* 220 U.S. 338 (1911):

> "In *Burton v. United States,* 202 U.S. 344, 381, Bishop's Criminal Law, vol. 1, §1051, was quoted with approval to the effect 'jeopardy is not the same when the two indictments are so diverse as to preclude the same evidence from sustaining both.' In that case this court said, speaking of a plea of *autrefois acquit,* 'It must appear that the *offense charged,* using the words of

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5. See, *Carter, supra,* at 389; *Albrecht v. United States,* 273 U.S. 1, 11 (1927); *American Tobacco Co. v. United States,* 328 U.S. 781, 787-89 (1946); *Pinkerton v. United States,* 328 U.S. 640, 643-44 (1946); *Pereira v. United States,* 347 U.S. 1, 11-12 (1954).

6. The Ohio Court of Appeals applied the same evidence analysis to determine the merits of Brown's double jeopardy assertion. This test, which follows *Blockburger, supra,* is employed by Ohio Courts, *Duvall v. State,* 111 Ohio St. 657 (1924); *State v. Best,* 42 Ohio St. 2d 530 (1975). The Court of Appeals pointed out that Brown needed to prove that the two convictions were premised on the same operative acts and that the prior conviction was for the identical offenses as the latter (citing *State v. Best, supra*). Specifically, it outlined what appellant-petitioner need prove.

> "2. To sustain a plea of former jeopardy it must appear:
>
> (1) That there was a former prosecution in the same state for the *same offense*;
>
> (2) that the same person was in jeopardy on the first prosecution;
>
> (3) that the parties are identical in the two prosecutions; and
>
> (4) that the particular offense, on the prosecution of which the jeopardy attached, was such an offense as to constitute a bar." (Emphasis added.)

> Chief Justice Shaw, "*was the same in law and in fact.* The plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, *however nearly they may be connected in fact.*" ' " See *Gavieres, supra,* at 343. (Emphasis added in part.)

Likewise, Mr. Justice Powell, writing for the majority affirming the defendant's conviction in *Iannelli v. United States,* 420 U.S. 770 (1975) stated:

> "The test articulated in *Blockburger v. United States*, 284 U.S. 299 (1932), serves a generally similar function of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction. In determining whether separate punishment might be imposed, *Blockburger* requires that courts examine the offenses to ascertain 'whether each provision requires proof of a fact which the other does not.' Id., at 304. As *Blockburger* and other decisions applying its principle reveal, see, e. g., *Gore v. United States,* 357 U.S. 386 (1958); *American Tobacco Co. v. United States,* 328 US 781, 788-789 (1946), *the Court's application of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the Blockburger test is satisfied notwithstanding a substantial overlap in the proof offered to establish the crimes."* See *Iannelli, supra,* at 785, fn. 17. (Emphasis added.) Contrast the *dissenting* opinion of Mr. Justice Douglas, arguing that the Double Jeopardy Clause was violated.

In Brown's case, the two statutes under which he was convicted define crimes, the elements of which are legally distinct on their faces. Ohio Revised Code,

§4549.04(D) (misdemeanor), the first statute under which Brown was convicted, states:

> "No person shall purposely take, operate, or keep any motor vehicle without the consent of the owner."

The elements of this misdemeanor offense are:[7]

(1) Purposely

(2) Operating

(3) A Motor Vehicle

(4) Without the Owner's Consent.

Ohio Revised Code §4549.04(A) (felony), the second statute under which Brown was convicted states:

> "No person shall steal any motor vehicle."

The elements of this felony offense are:[8]

(1) Steal (i.e. taking with the intent to permanently deprive the owner of possession)

(2) A Motor Vehicle.

Assuming that the misdemeanor statute (§4549.04(D), Ohio Revised Code) requires that the defendant "know" that he does not have the consent of the owner,[9] that

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7. BALDWIN'S OHIO CRIMINAL LAW, 6th Ed., 1973 Cumulative Service [i.e. pocket part supplement] page 36. Venue, which the State must always establish under Ohio law, has been omitted.

8. *Id.* at 36.

9. The text of the misdemeanor statute (Section 4549.04 (D)) permits a construction which requires no bad intent on the part of the defendant, and triggers liability if the defendant "purposely . . . operates" another's automobile, regardless of his scienter with respect to the true owner's consent. Ohio Courts have not passed on the quality of the scienter element contained in the misdemeanor statute. Obviously, if Section 4549.04(D) is read to contain *no scienter*, and thus trigger strict liability, it certainly delineates a crime different from the *felony* offense of Section 4549.04(A), which *contains* the scienter element of stealing, i.e. the intent to deprive the true owner of possession permanently.

intent differs from the intent element of the felony theft statute (§4549.04(A), Ohio Revised Code). With respect to the misdemeanor offense (§4549.04(D), Ohio Revised Code) "[t]here is no requirement of knowledge that the vehicle was stolen in order to convict," see *State v. Ikner*, 44 Ohio St. 2d 132, 134 (1975). However, the intent element of the felony theft statute (§4549.04(A), Ohio Revised Code) requires that the defendant himself intend "to *permanently* deprive the owner of possession," See *State v. Brown*, Decision of the Ohio Court of Appeals, Case No. 34316 (Cuyahoga, December 11, 1975), Appendix 22.[10]

For example, under the bare language of the misdemeanor statute, the State establishes the elements of the misdemeanor (§4549.04(D), Ohio Revised Code), operating a motor vehicle without the owner's consent, if the evidence shows that a defendant borrowed a stolen car from a thief, and operated it, knowing only that he [the defendant] was *not* authorized to operate it by the actual owner, and despite the fact that the defendant has no knowledge that the thief stole the auto.[11] Although such evidence establishes the elements of the misdemeanor statute (§4549.04(D), Ohio Revised Code), it certainly

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10. There is substantial doubt that the Ohio Supreme Court would hold that the misdemeanor of operating an auto without the owner's consent is a lesser included offense, and therefore an identical offense, of the felony of auto theft. See *State v. Ikner*, 44 Ohio St. 2d 132, 134 (1975), and cases cited in the State of Ohio's Brief *infra* at footnotes 12, 14. Should the United States Supreme Court, in Brown's case, conclude that Ohio law controls regarding whether the misdemeanor is a lesser included offense of the felony, then it should remand Brown's case to the Ohio Supreme Court to determine this question of Ohio law. Compare *Waller v. Florida*, 397 U.S. 387, 390, footnote, 1, 395, *on remand* 270 So. 2d 26, 28-29 (Florida, 1973), *cert. den.* 414 U.S. 945 (1973).

11. As indicated in the text, the defendant need not know that the vehicle was stolen in order to be guilty of the misdemeanor of operating the vehicle without the owner's consent. See *Ikner, supra* at 134.

does not satisfy the elements of the felony of auto stealing (§4549.04(A), Ohio Revised Code). A defendant who receives custody of property from a thief, when the thief voluntarily relinquishes such custody to the defendant, does not intend to "permanently" deprive the actual owner of possession. In fact, such a defendant may receive custody from the thief with the intent to operate the auto without the consent of the owner, and after several days, when the defendant first learns that the auto is stolen, return it to the true owner. Therefore, on the face of the two statutes, the legal quality of the intent elements differs between the misdemeanor (§4549.04(D), Ohio Revised Code) and the felony (§4549.04(A), Ohio Revised Code) statutes. However, this is not the only distinguishing feature between the legal elements of the two statutes.

The felony statute (§4549.04(A), Ohio Revised Code) requires that the defendant *physicially steal*, i.e. take with the intent of depriving the owner of possession permanently, whereas the misdemeanor statute (§4549.04(D), Ohio Revised Code), requires that the defendant *operate* the auto without the owner's consent. A defendant certainly may *steal* an automobile without *operating* it. For example, he may *steal* the car in violation of (§4549.04(A)) by using a truck to tow it away from the owner's driveway. Such a theft, without operating the car, i.e. sitting inside, turning the ignition, and touching the accelerator, could never result in a conviction for *operating* the automobile without the owner's consent in violation of (§4549.04(D), Ohio Revised Code).

Thus, the legal elements of the misdemeanor and felony statutes differ, on their faces, in two regards. *First*, the characteristics of the intent elements differ, the misdemeanor predicating liability on the intent to use without

the owner's consent, irrespective of the intended duration of such use, and the felony predicating liability on the intent to withhold possession from the owner *permanently*. *Second*, the conduct prohibited by each statute differs, the misdemeanor predicating liability only on "*operation*" of the vehicle, whereas the felony predicates liability on the physical *taking* of the auto, irrespective of whether the vehicle is ever operated.

Under the test which this Court expressed in *Gavieres v. United States*, 220 U.S. 338 (1911) each statutory offense on its face, requires different proof of at least one fact which is not required by the other statutory offense and therefore the two statutes do not prohibit the "same offense" within the meaning of the Double Jeopardy Clause. The *Gavieres* Court stated at 342:

> "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but *whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.*" (Emphasis added.)

From the discussion above, it is obvious that the intent element, on the face of each statute, requires "proof of an additional fact which the other does not." The misdemeanor is established by proof that the defendant received custody of the auto from a thief and operated it, knowing

that the true owner did not consent to the defendant's operation, but these additional facts could not establish the elements of the felony of auto theft. Likewise, the felony of auto theft is established by proof that the defendant used a truck to tow the auto away from the victim's custody, but these additional facts could not establish the elements of the misdemeanor of *operating* an auto without the owner's consent.

(B) Prosecution and Conviction for a Lesser Included Offense Does Not Bar Subsequent Prosecution for the Greater Offense Under the "Same Evidence" Test of Blockburger v. United States, 284 U.S. 299, 304 (1932); Gavieres v. United States, 220 U.S. 338, 342-43 (1911).

In his brief at page 7, footnote 3, Brown makes the overbroad assertion that, "prosecution for a lesser included offense barred prosecution for the greater," citing *Waller v. Florida*, 397 U.S. 387, 390 (1970). See also, *Ashe v. Swenson*, 397 U.S. 436, 452, footnote 4 (Brennan concurring) (citing *no* opinion by any court as authority). Brown argues that his second conviction for the felony offense constitutes Double Jeopardy under a chimerical "exception" to the "same evidence rule," because the Ohio Court of Appeals held that the misdemeanor of operating a car without the owner's consent (§4549.04(D), Ohio Revised Code) is a lesser included offense of the felony of auto stealing (§4549.04(A), Ohio Revised Code). Compare *Ashe, supra,* at footnote 4 (Brennan concurring).

Assuming that the misdemeanor of operating an auto without the owner's consent is a lesser included offense under Ohio Law, an assumption which the Respondent

rejects,[12] convictions for such an offense do not bar prosecution for the greater offense. A greater offense is distinguished from a lesser included offense because the greater offense contains all of the elements of the lesser *plus*, one or more additional elements not located in the lesser offense. Thus the distinction between the greater and lesser offenses fits exactly outside the classical definition of the same evidence test articulated in *Gavieres, supra* at 342:

> "A single act may be an offense against two statutes; and if each statute requires proof *of an additional fact which the other does not*. . . [a] *conviction* under either statute does not exempt the defendant from prosecution and punishment under the other." (Emphasis added.)

Even Justice Brennan concedes that ". . . where one offense is included in another . . . the evidence necessary to prove the two offenses is different." See *Ashe, supra,* footnote 4 (Brennan concurring).[13] Therefore, under the *Gavieres*

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12. Several Ohio cases have held that the misdemeanor of operating an auto without the owner's consent is *not* a lesser included offense of theft of an auto. See *Hoop v. State*, 26 Ohio L. Abs. 598, 599-600 (Montgomery County Court of Appeals, 1938); *State v. Marcum*, 18 Ohio App. 2d 190, 192 (Franklin County Court of Appeals, 1969); Compare *State v. Ikner*, 44 Ohio St. 2d 132, 134 (1975) (Holding that the misdemeanor of operation of a motor vehicle without the owner's consent is *not* a lesser included offense of the felony of concealing a stolen motor vehicle.)

13. In *Ashe, supra,* at footnote 4, Mr. Justice Brennan stated, in toto:

> "Several subsidiary rules have been developed in attempts to eliminate anomalies resulting from the 'same evidence' test. Thus, *where one offense is included in another, prosecution for one bars reprosecution for the other even though the evidence necessary to prove the two offenses is different.* Similarly, doctrines of *res judicata* and collateral estoppel have provided some, though not very much, relief

(Footnote continued on following page)

test Brown's prosecution for a lesser included offense, followed by a prosecution for the greater offense, cannot constitute a redundant prosecution for the "same offense" because the greater offense requires proof of a fact (i.e. the element which separates the greater offense from the lesser offense) which is not litigated in the first trial.[14] The State of Ohio concedes that had Brown been tried for the lesser offense first, and *acquitted,* then although the "same evidence" Double Jeopardy test of *Gavieres* would permit his retrial for the greater offense, such a result would be interdicted by operation of the *collateral estoppel* Double Jeopardy Rule enunciated after *Gavieres,* in *Ashe v. Swenson,* 397 U.S. 436, 445-47 (1970). However, the *Ashe* qualifications of the *Gavieres* "same evidence" test furnishes no aid to Brown who was *convicted* on the first charge. Significantly counsel for Petitioner Brown concedes that the *Ashe* doctrine furnishes no support for his client:

(Continued from previous page)

> from the extreme permissiveness of the test. See generally Kirchheimer, The Act, The Offense and Double Jeopardy, 58 Yale L. J. 513 (1949). Numerous practical exceptions to the test are discussed in Horack, The Multiple Consequences of a Single Criminal Act, 21 Minn. L. Rev. 805 (1937). So many exceptions to the 'same evidence' rule have been found necessary that it is hardly a rule at all; yet the numerous exceptions have not succeeded in wholly preventing prosecutorial abuse."

Justice Brennan offers no judicial, precedential authority for the position he adopts.

14. See the Ohio definition of the distinction between greater offenses and their lesser included offenses in *State v. Hereno,* 162 Ohio St. 193, 196-97 (1954):

> "Where the elements of another offense are not included among those of the offense charged in the indictment, the defendant cannot be found guilty of such other offense under the indictment. However, if certain but not all the elements of the offense charged in the indictment constitute in themselves an offense, then such offense is a lesser included offense."

"Nor could Petitioner invoke the doctrine of *collateral estoppel* at the time of the hearing in the East Cleveland Court. First, under the Ohio Court of Appeals' decision, the *two charges are based on different operative acts.* Second, even if they are based on the same operative act, Petitioner pled guilty to the charge in the Willoughby Court, thereby conclusively establishing the elements of trespassory taking and asportation. The State can very easily use these two admitted elements at subsequent trials and tack on other elements. *See Abbate v. United States,* 359 U.S. 187, 200 n. 4, 3 L. Ed.2d 729 n. 4 (1959) (Brennan, J. concurring). Finally, Petitioner cannot argue an implied acquittal of any elements sought to be proved in the East Cleveland Court upon which he never faced jeopardy on in the Willoughby Court. *Price v. Georgia,* 398 U.S. 323, 328-329, 26 L. Ed.2d 300, 305 (1970)." See Petitioner Brown's Brief at 19, and footnote 16. (Emphasis added in part.)

Brown's reliance on *Waller v. Florida,* 397 U.S. 387 (1970), is equally misplaced. *Waller* was not a case where the United States Supreme Court held that an initial conviction for a lesser included offense precluded a subsequent trial on the greater offense. The issue in *Waller* was whether a Florida Municipality and the State of Florida constituted separate sovereigns permitting serial prosecutions for an "identical offense." The *Waller* Court expressly qualified its holding on the State Court's assumption that both statutes punished identical crimes. In *Waller* the United States Supreme Court wrote:

> "We act on the statement of the District Court [of Florida] of Appeal that the second trial on the felony charge by information 'was based on the same

> acts of the appellant as were involved in the violation of the two city ordinances' and on the assumption that the ordinance violations were included offenses of the felony charge. Whether in fact and law petitioner committed separate offenses which could support separate charges was not decided by the Florida courts, nor do we reach that question. What is before us is the asserted power of the two courts within one State to place petitioner on trial for the same alleged crime." See *Waller, supra* at 390 and also footnote 1 at 390.

The *Waller* Court, holding that the two political subdivisions constituted one sovereign, vacated the state court's judgment and remanded the case, for a conclusive determination of whether the two offenses were identical. See *Waller, supra,* at 395. Consequently, on remand, the District Court of Appeal of Florida, Second District, held that the two statutes were *not identical.* See, *Waller v. Florida,* 270 So. 2d 26, 28-29 (1973), *cert. den.* 414 U.S. 945 (1973) (Brennan, Douglas, Marshall dissenting on denial of cert.).

Therefore, prosecution and conviction for a lesser included offense does *not* bar subsequent prosecution for the greater offense under the "same evidence" test of *Blockburger* and *Gavieres, supra.*

(C) Petitioner Brown's Serial Convictions for the Separate Misdemeanor Offense (Ohio Revised Code §4549.04(D)), of Operating a Motor Vehicle Without the Owner's Consent, and the Felony Offense (Ohio Revised Code §4549.04(A)) of Auto Theft Do Not Constitute Multiple Convictions for Identical, Inherently "Continuous Offenses" in Violation of the Double Jeopardy Clause as Construed by in Re Snow, 120 U.S. 274, 281 (1887).

Petitioner Brown argues that his second prosecution for the felony offense of auto theft (§4549.04(A), Ohio Revised Code) constitutes a fragmented prosecution for separate periods of time during "an inherently continuous offense," in violation of the Double Jeopardy Clause as construed by *In Re Snow*, 120 U.S. 274, 281 (1887). Brown contends that the felony offense of auto theft continued throughout the nine days between November 29, 1973, the day he stole the auto, and December 8, 1973, the day he was arrested for the misdemeanor of operating an auto without the owner's consent.

First, Brown offers no Ohio authority for the novel theory that auto stealing is a "continuous" offense. See Petitioner Brown's Brief, pages 9-11. His only Ohio authority consists of a flimsy analogy based on the Ohio Supreme Court's recognition that the crime of *concealing stolen property* is a continuous act as long as the property remains in control of the concealer. See *Ohio v. Smith*, 59 Ohio St. 350, 365 (1898) (*dicta*). The fact that concealing stolen property is a continuous offense has no bearing on the question of whether theft of an automobile is a continuous offense under Ohio law. If this Court "constitutionalizes" the Ohio law question of when an offense is "continuous", and determines that theft is a "continuous" offense, triggering the Double Jeopardy implications which

attach through *In Re Snow, supra*, this Court will adversely affect State-Federal comity by opening the door to numerous federal habeas corpus actions where state convicts throughout the country will seek release under the Double Jeopardy Clause, by arguing that their multiple theft convictions in State courts comprised serial convictions for "one continuous" theft offense. Such a deleterious intrusion into state administration of criminal justice is inconsistent with this Court's recent decision in *Stone v. Powell*, ... U.S. ....., ..., 49 L.Ed.2d 1067, 1088 (1976). Significantly, the cases cited by Brown, in which this Court has previously construed multiple convictions to be "continuous" for Double Jeopardy Clause purposes were cases arising *solely under federal law*, where the question of Federal-State comity was obviously not present. See *In Re Snow*, 120 U.S. 274, 276 (1887) (Proceedings in the Federal District Court for the "Territory of Utah"); *Milanovich v. United States*, 365 U.S. 551, 552, 558-59 (1961) (Frankfurter, concurring) (Theft and Receiving Stolen Property under 18 U.S.C. Section 641 constitutes one continuous offense); *United States v. Universal C.I.T. Credit Corporation*, 344 U.S. 218, 221-226, footnote 4 (1952) (Section 15 of the Fair Labor Standards Act penalizes a course of conduct, and not each separate breach of the statutory duty owed to an employee during any workweek). The State of Ohio urges this Court not to intrude into a domain properly reserved to state courts by "constitutionalizing" the question of whether a State theft crime constitutes a "continuous offense" in the absence of an authoritative state court decision on that question.

Furthermore, the Respondent urges that the elements of the felony of auto theft (§4549.04(A), Ohio Revised Code) delineate a crime which is terminated once the defendant takes the auto with the intent to permanently deprive the owner of possession. While the person who

has stolen the auto must be deemed to continuously control or conceal it, see *Ohio v. Smith, supra,* at 365, such a thief need not be logically deemed to have "operated" the vehicle continuously for nine days thereafter, especially since, as discussed in the Respondent's Brief, *supra,* at Part I(A), a defendant may logically steal an auto without *ever* operating it.

Lastly, the Respondent notes that *In Re Snow, supra,* has no bearing on the factual web which ensnares Brown. In *In Re Snow,* this Court struck down multiple convictions, for *identical* conduct, i.e., cohabiting with several women in violation of 22 Stat. 31 (1882), on the theory that, under federal law, each infraction of the same statute occurred in a continuous period of time. See *In Re Snow, supra,* at 281-83; see also, *Ebeling v. Morgan,* 237 U.S. 625, 630 (1915); and *Blockburger v. United States,* 284 U.S. 299, 301-303 (1932) where this Court wrote:

"The contention on behalf of petitioner is that these two sales, having been made to the same purchaser and following each other with *no substantial interval of time between the delivery of the drug in the first transaction and the payment for the second quantity sold,* constitute a single continuing offense. *The contention is unsound.* The distinction between the transactions here involved and an offense continuous in its character, is well settled, as was pointed out by this court in the case of *In re Snow,* 120 U.S. 274. There it was held that the offense of cohabiting with more than one woman, created by the Act of March 22, 1882, c. 47, 22 Stat. 31, was a continuous offense, and was committed, in the sense of the statute, where there was a living or dwelling together as husband and wife. The court said (pp. 281, 286):

'It is, inherently, a continuous offence, having duration; and not an offence consisting of an isolated act.

* * * * *

'A distinction is laid down in adjudged cases and in textwriters between an offence continuous in its character, like the one at bar, and a case where the statute is aimed at an offence that can be committed *uno ictu.*'

The Narcotic Act does not create the offense of engaging in the business of selling the forbidden drugs, but penalizes any sale made in the absence of either of the qualifying requirements set forth. Each of several successive sales constitutes a distinct offense, however closely they may follow each other. The distinction stated by Mr. Wharton is that 'when the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.' *Wharton's Criminal Law,* 11th ed., § 34. Or, as stated in note 3 to that section, 'The test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately . . . If the latter, there can be but one penalty.'

In the present case, the first transaction, resulting in a sale, had come to an end. The next sale was not the result of the original impulse, but of a fresh one—that is to say, of a new bargain. The question is controlled, not by the *Snow* case, but by such cases as that of *Ebeling v. Morgan,* 237 U.S. 625. There the accused was convicted under several counts of a willful tearing, etc., of mail bags, with

intent to rob. The court (p. 628) stated the question to be, 'whether one who, in the same transaction, tears or cuts successively mail bags of the United States used in conveyance of the mails, with intent to rob or steal any such mail, is guilty of a single offense or of additional offenses because of each successive cutting with the criminal intent charged.' Answering this question, the court after quoting the statute, § 189, Criminal Code (U.S.C., Title 18, § 312), said (p. 629):

> 'These words plainly indicate that it was the intention of the lawmakers to protect each and every mail bag from felonious injury and mutilation. Whenever any one mail bag is thus torn, cut or injured, the offense is complete. Although the transaction of cutting the mail bags was in a sense continuous, the complete statutory offense was committed every time a mail bag was cut in the manner described, with the intent charged. The offense as to each separate bag was complete when that bag was cut, irrespective of any attack upon, or mutilation of, any other bag.'

See also *In re Henry*, 123 U.S. 372, 374; *In re De Bara*, 179 U.S. 316, 320; *Badders v. United States*, 240 U.S. 391, 394; *Wilkes v. Dinsman*, 7 How. 89, 127; *United States v. Daugherty*, 269 U.S. 360; *Queen v. Scott*, 4 Best & S. (Q.B.) 368, 373."

If the multiple violations of the identical illegal sales involved in *Blockburger, supra,* and the identical illegal mailbag tearings involved in *Ebeling, supra,* escaped classifications as "continuous" offenses, certainly the two offenses, occurring nine days apart, for which Brown was convicted, i.e., the *felony* of auto theft, and the *misdemeanor* of operating an auto without the owner's consent,

must be treated as *DIS*-continuous offenses under *In Re Snow*; especially in light of the fact that the two crimes for which Brown was convicted contained *different* elements, as opposed to the absolutely *identical* crimes which the *Snow* Court treated as "continuous". See Respondent's Brief, *supra*, at Part I(A).[15]

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15. Petitioner Brown, on page 12 of his Brief, footnote 7 refers this Court to a series of cases. An examination of these decisions reveals that they are not helpful to the precise issue confronting this Court. For example: *United States v. Jones*, 533 F.2d 1387 (6th Cir., 1976) (Court construed 18 U.S.C.A. App. Sec. 1202(a) and determined that Congress intended to punish as one offense all of the acts of dominion which demonstrate a continuing possessory interest in a firearm); *Baldwin v. Wisconsin*, 62 Wisc. 2d 521, 215 N.W.2d 541 (1974) (Facts of case supported two separate false imprisonment offenses); *New Jersey v. Witte*, 15 N.J. 598, 100 A.2d 754 (1953), *cert. denied* 347 U.S. 951 (Amendment of the indictment did not create new and separate offenses for keeping of a disorderly house over a three year period); *Connecticut v. Licari*, 132 Conn. 220, 43 A.2d 450 (1954) (Driving while intoxicated one offense); *Illinois v. Smice*, 33 Ill. App. 3d 674, 338 N.E.2d 213 (1975) (Since attack on two police officers were not independently motivated, it constituted one offense); *Ex Parte Evans*, 530 S.W.2d 589 (1975) (Sequence of time continuous); *Illinois v. Tate*, 37 Ill. App. 3d 358, 346 N.E.2d 79 (1976) (Simultaneous deviate sex acts constituted one crime); *Illinois v. Helton*, ... Ill. App. 3d ....., 349 N.E.2d 508 (1976) (Defendant's intent would support additional crimes); *Illinois v. Neal*, 37 Ill. App. 3d 713, 346 N.E.2d 178 (1976) (Convictions for kidnapping and rape of victim several hours later was determined to be two offenses); *California v. Slocum*, 52 Cal. App. 3d 867, 125 Cal. Rptr. 442 (1976), *cert. denied* ..... U.S. ..... (Whether a series of wrongful acts under California law constitutes a single offense is dependent upon facts of a particular case); *Pennsylvania v. Clark*, 238 Pa. Super. 444, 357 A.2d 648 (1976) (No double jeopardy raised, the issue in this case being whether doctrine of merger precluded the crimes of solicitation and bribery); *Wisconsin v. George*, 69 Wisc. 2d 92, 230 N.W.2d 253 (1975) (Pursuant to a Wisconsin Statute, an individual can be charged with one continuous offense of commercial gambling or individual offenses at election of state); *Utah v. Dolan*, 28 Utah 2d 331, 502 P.2d 549 (1972) (Construing Utah's statute on bad checks); *Illinois v. Tannahill*, 38 Ill. App. 3d 767, 348 N.E.2d 847 (1976) (Sale of obscene materials on different dates constitute separate offenses, no double jeopardy raised); *Florida v. Peavey*, 326 So. 2d 461 (1976) (Where prior information charging defendant with possession of marijuana based on search of automobile was dismissed, a second prosecution was not precluded

(Footnote continued on following page)

II. THE FIFTH AMENDMENT DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION DOES NOT REQUIRE THAT THE DEFENDANT BE TRIED ONLY ONCE FOR ALL SEPARATE OFFENSES ARISING FROM A COURSE OF CRIMINAL CONDUCT WHICH MAY FORM A SINGLE TRANSACTION.

(A) The Same Transaction Test Is Not Recognized as the Standard for Applying the Fifth Amendment Double Jeopardy Clause.

Petitioner Brown states his thesis urging this Court to "constitutionalize" the same transaction theory of the Double Jeopardy Clause when he quotes the American Law Institute (hereinafter A.L.I.) for the proposition that double jeopardy attaches when a defendant is subject:

> ". . . to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court." See Petitioner Brown's Brief at page 18, quoting from the Model Penal Code (U.L.A.) §1.07 (2) (1974).[16]

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where possession of marijuana charge was based on search of defendant's *home*); *Oregon v. Jackson,* ..... Ore. App. ....., 541 P.2d 1072 (1975) (One crime where accused delivered two forged warranty deeds *simultaneously* to a county clerk for recording); and *McKinney v. Birmingham,* 52 Ala. App. 605, 296 So. 2d 197 (1973) (Plea of former jeopardy unavailable to defendant charged with exhibition of obscene films on separate dates where films were not precisely the same in law and fact).

16. In his Brief at page 20, footnote 20, Petitioner Brown suggests that the Ohio Supreme Court, as a matter of Ohio law, rejected the "same evidence" test, presumably in favor of a compulsory joinder species of the same transaction test, in *State*

(Footnote continued on following page)

The A.L.I.'s Double Jeopardy rule improperly balances the competing interests aroused by Petitioner Brown's Double Jeopardy claim. The criminal defendants' interest protected under the "second prosecution for the

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v. Ikner, 44 Ohio St. 2d 132 (1975). This speculation is premised upon the concurring opinion by Justice Brown. Petitioner's reliance on this argument is slight for a very good reason, Justice Brown's analysis of Ohio Revised Code, Section 2941.25 is simply wrong.

In reference to the then new code section Justice Brown states, ". . . since the General Assembly has determined that an accused cannot be convicted for multiple counts arising out of the same transaction", *Ikner, supra,* at 136. Ohio Revised Code, Section 2941.25 reads as follows:

> §2941.25 Multiple counts.
>
> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information *may* contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information *may contain* counts for all such offenses, and the defendant may be convicted of all of them. (Emphasis added.)

This is an allowance for *permissive joinder* in Ohio Criminal proceedings, it is not a requirement for mandatory joinder. A compelled same transaction analysis is not the law in Ohio as Justice Brown's concurring opinion would lead one to believe. *Further, the syllabus, which in Ohio, states the holding of the case, follows Blockburger v. United States,* 284 U.S. 299 (1932).

In the same footnote Petitioner Brown suggests that New York has rejected, in part, the same evidence test under state law. The correct statement of the status of this Double Jeopardy test in New York was recited in *Cousins v. Maryland,* 354 A.2d 825, 830-31 footnote 3 (Md. Ct. Appeals, 1976), *cert. denied* 45 U.S.L.W. 3429, Case No. 76-339 (December 13, 1976).

> "New York has a statutory double jeopardy provision which prohibits successive prosecutions with several broad exceptions such as where each offense contains an element which the other does not and each statutory provision is designed to prevent a different harm or evil. N.Y.Crim.Pro.L.

(Footnote continued on following page)

same offense after conviction"[17] species of double jeopardy cases collides head on with the State's important legitimate interest in punishing each violation of its unique, discrete criminal statutes.[18] Consequently most jurisdictions reject attempts to intrude the same transaction test into Fifth Amendment Double Jeopardy and Due Process analysis, as well as rejecting this theory under state law.

In *Cousins v. Maryland*, 354 A.2d 825 (Md. Ct. App., 1976), *cert. den.* ..... U.S. ....., 45 U.S.L.W. 3429, Case No. 76-339 (December 13, 1976), the defendant urged the Court to adopt the same transaction Double Jeopardy test. Defendant was approached by two retail store guards, Marilyn Neal and Ronald Wood, and accused of shoplifting several leather coats which Cousins had in his possession outside the store. When Neal and Wood approached Cousins, he drew a knife, pointed it directly at officer Neal, threatened her, and escaped. *Cousins, supra,* at 827. A warrant was sworn out against Cousins, charging him with shoplifting, and assault upon both Neal and Wood. Cousins was arrested and charged with two counts of larceny, two counts of shoplifting, two counts of receiving stolen property, one count of assault on Marilyn Neal, and one count of carrying openly a weapon with intent to injure. *Cousins, supra* at 827-28. The trial court proceeded *only* on the charge, in the warrant, of assault upon Wood,

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§ 40.20(2). *See Abraham v. Justices of New York, Etc.*, 43 A.D.2d 414, 352 N.Y.S.2d 451 (1974). *This is essentially the same as the required evidence test.* Multiple prosecutions may be barred, however, as a matter of state constitutional law if the record dicloses harassment. *Nolan v. Court of General Sessions of County of N. Y.*, 11 N.Y.2d 114, 227 N.Y.S.2d 1, 181 N.E.2d 751, 753 (1962)."

17. See *United States v. Wilson*, 420 U.S. 332, 343 (1975), and the State of Ohio's Brief *supra* at Part I(A).

18. See State of Ohio's Brief *supra* at Part I(A).

and acquitted him of this charge. Cousins then moved to dismiss the whole indictment on the ground that his acquittal, under the same transaction theory of the Double Jeopardy Clause precluded trial on the remaining counts in the indictment, because they arose from a single criminal episode.[19] The Maryland Court framed the Double Jeopardy issue:

> "In this case we are presented with the question of whether successive trials on charges arising from what is claimed to be the same criminal transaction are prohibited by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution . . . ." *Cousin's supra,* at 827.

In rejecting Cousin's same transaction theory of the Federal Constitutional Double Jeopardy provision, the court exhaustively analyzed the history of the same transaction doctrine in American jurisprudence.

> . . . "for Traditionally, the 'same evidence' or 'required evidence' test has been the standard for determining whether different statutory offenses are to be deemed the same for double jeopardy purposes. If each offense requires proof of a fact which the other does not, neither multiple prosecutions nor multiple punishments are barred by the prohibition against double jeopardy even though each offense may arise from the same act or criminal episode. Only where one offense requires proof of a fact not required by the other, or where neither offense requires proof of an additional fact, are the offenses deemed the same for

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19. *Cousins, supra,* at 833-34, also dealt with the issue of Double Jeopardy-Collateral Estoppel, because Cousins, unlike Petitioner Brown in the case currently before this Court, was acquitted at his first trial. See, *Ashe v. Swenson,* 397 U.S. 436, 445-47 (1970).

double jeopardy purposes, with successive prosecutions and multiple punishments being prohibited. *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); *Gavieres v. United States*, 220 U.S. 338, 31 S.Ct. 421, 55 L.Ed. 489 (1911); . . . .

The required evidence test as used in multiple prosecution situations was challenged by Mr. Justice Brennan in a separate opinion in *Abbate v. United States*, 359 U.S. 187, 196-201, 79 S.Ct. 666, 671-674, 3 L.Ed.2d 729, 735-738 (1959), in which he also delivered the opinion of the Court, and in a concurring opinion in *Ashe v. Swenson, supra*, 397 U.S. at 448-461, 90 S.Ct. 1189, 1197 as failing to satisfy the underlying principles of the Fifth Amendment's double jeopardy clause. Noting that one of the purposes of the double jeopardy clause was to prohibit the state from repeatedly attempting to convict an individual 'thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity,' Mr. Justice Brennan concluded 'that successive . . . prosecutions of the same person based on the same acts are prohibited by the Fifth Amendment even though brought under . . . statutes requiring different evidence and protecting different . . . interests.' *Abbate v. United States, supra*, 359 U.S. at 199, 197, 79 S.Ct. at 672. He proposed that the prosecution be required to join at one trial all charges arising out of a single criminal act or episode, *Ashe v. Swenson, supra*, 397 U.S. at 453-454, 90 S.Ct. at 1199:

> 'In my view, the Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction. This "same transaction" test of "same offence" not only enforces the ancient prohibition against vexatious multiple prosecutions embodied in the Double Jeopardy Clause, but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience. Modern rules of criminal and civil procedure reflect this recognition.'

Despite the constitutional dimensions of the same transaction test proposed by Mr. Justice Brennan, it is in essence a compulsory joinder provision. Certain exceptions would be permitted. Joinder would not be required where the state, after diligent investigation, did not discover the second offense, or where no single court had jurisdiction over all offenses, or where joinder would be prejudicial to either the state or the accused, 397 U.S. at 453 n. 7, 455 n. 11, 90 S.Ct. 1189. Moreover, the same transaction test would not be used to define the meaning of 'same offense' in the Fifth Amendment for all purposes; it would only compel the prosecution to join all offenses arising from a single criminal act, episode or transaction in a single trial. Thus, the required evidence test apparently would still be used by Mr. Justice Brennan to determine whether separate statutory offenses tried in a single action were the same for double jeopardy purposes so as to prohibit multiple punishments from being imposed. *Ashe v. Swenson, supra*, 397 U.S. at 460 n. 14, 90 S.Ct. 1189; *Abbate v. United States, supra*, 359 U.S. at 198, 79 S.Ct. 666.

* * * * *

The majority of states, . . . have not adopted the same transaction test but have continued to apply the required evidence test for defining whether two offenses are the same for double jeopardy purposes. For cases rejecting the same transaction test, *see, e. g., Martinez v. People,* 174 Colo. 365, 484 P.2d 792, 794-795 (1971); *Hampton v. State,* 304 So.2d 498, 499-500 (Fla.App.1974); *State v. Tanton,* 88 N.M. 333, 540 P.2d 813, 816 (1975); *State v. Cobb,* 18 N.C.App. 221, 196 S.E.2d 521, 523-524 (1973); *Kupiec v. State,* 493 P.2d 444, 446 (Okl.Cr.App.1972); *State v. Pickering,* S.D., 225 N.W.2d 98, 100-101 (1975); *Jones v. State,* 514 S.W.2d 255, 256 (Tex.Cr.App.1974); *State v. Elbaum,* 54 Wis.2d 213, 194 N.W.2d 660, 663-664 (1972); *see also Kuklis v. Commonwealth,* 361 Mass. 302, 280 N.E.2d 155, 158-159 (1972).

. . . [T]he *same transaction standard . . . has not been applied as a federal constitutional requirement.* In *Morgan v. Devine,* 237 U.S. 632, 641, 35 S.Ct. 712, 59 L.Ed. 1153 (1915), *the Supreme Court rejected the contention that the identity of offenses for double jeopardy purposes is based upon the criminal act or occurrence rather than the elements of each separate offense alleged,* stating (237 U.S. at 641, 35 S.Ct. at 715):

> '. . . this court has settled that the test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes.'

See Carter v. McClaughry, 183 U.S. 365, 394-395, 22 S.Ct. 181, 46 L.Ed. 236 (1902). And in *Gavieres v. United States, supra,* 220 U.S. at 341, 342, 31 S.Ct.

421, 422, the Court emphasized that multiple prosecutions are barred by the double jeopardy clause only when the offenses charged in both prosecutions are the same under the required evidence test:

> 'It is to be observed that the protection intended and specifically given is against second jeopardy for the *same offense*. . . .
>
> * * * * *
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> 'It is true that the acts and words of the accused set forth in both charges are the same; but in the second case it was charged, as was essential to conviction, that the misbehavior in deed and words was addressed to a public official. In this view we are of the opinion that while the transaction charged is the same in each case, the offenses are different.'

Applying the required evidence test, the Court found that the offenses charged in each prosecution were different and that, therefore, the second prosecution was not barred by the first." See *Cousins, supra* at 829-831. (Emphasis added in part.)

The *Cousins* Court noted that the lower Federal Courts have rejected the same transaction doctrine:

> "The lower federal courts have declined to adopt the same transaction test in cases involving multiple prosecutions in view of the Supreme Court's reluctance to do so, applying instead the required evidence test. In *United States v. Wilder,* 150 U.S.App. D.C. 172, 463 F.2d 1263 (1972), the court held that successive prosecutions for failing to register a firearm and for possession of a firearm without a license did not violate the double jeopardy clause. Both charges arose from

the defendant's possession of the firearm, and the court, applying the required evidence test, found that the offenses were not the same. The Court went on to reject the defendant's double jeopardy claim that since both offenses arose from the same act, only one prosecution was constitutionally permissible. *The court specifically noted that the Supreme Court had not adopted the same transaction test advocated by Mr. Justice Brennan,* 463 F.2d at 1266 n. 9. *See also United States v. Cala,* 521 F.2d 605, 607 (2d Cir. 1975); *Bell v. State of Kansas,* 452 F.2d 783, 792 (10th Cir. 1971), *cert. denied,* 406 U.S. 974, 92 S.Ct. 2421, 32 L.Ed.2d 674 (1972); *Hattaway v. United States,* 399 F.2d 431, 432-433 (5th Cir. 1968)." *Cousins, supra* at 831-832. (Emphasis added.)

Thus the Maryland Court, following the holdings of both the United States Supreme Court,[20] and the lower federal courts, uncategorically repudiated the same trans-

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20. In his separate opinion in *Abbate v. United States,* 359 U.S. 187 (1959) Mr. Justice Brennan states ". . . [N]either this 'same evidence' test nor a 'separate interests' test has been sanctioned by this Court under the Fifth Amendment except in cases in which consecutive sentences were imposed on conviction of several offenses *at one trial.*" *Abbate, supra* at 198 (Brennan, J.) (Emphasis added). However, in footnote 2 Justice Brennan grudgingly admits that *Gavieres v. United States,* 220 U.S. 338 (1911) does not fit his overbroad generalization.

> "*Gavieres v. United States,* 220 U.S. 338, upheld a prosecution for insulting a public officer *despite a prior prosecution* for indecent behavior in public based on essentially the same acts. However, that decision was an interpretation of a congressional statute against double jeopardy applicable to the Philippine Islands, a territory 'with long-established legal procedures that were alien to the common law.'" See *Abbate, supra,* at 198, footnote 2.

Justice Brennan's *confinement* of *Gavieres* to statutory construction is erroneous. The *Gavieres* Court wrote:

> "Section 5 of the act of Congress of July 1, 1902, 32 Stat., c. 1369, 691, provides: 'No person, for the same offense, shall be twice put in jeopardy of punishment.'
>
> *(Footnote continued on following page)*

action test for the application of the Double Jeopardy Clause to multiple prosecution cases.

> "The appellant in the instant case urges us to interpret the Fifth Amendment guarantee against double jeopardy as embodying the same transaction test in multiple trial situations. However, we are not free to do so. We are bound by the Supreme Court's holding that multiple prosecutions are barred under the double jeopardy clause only for offenses which are the same under the required evidence test." *Cousins, supra,* at 832.

Therefore, the overwhelming weight of American jurisprudence rejects the principle that the United States Constitution mandates that Double Jeopardy be assessed under the same transaction standard urged by Petitioner Brown.

(B) The Same Transaction Theory Furnishes No Manageable Judicial Standards for the Application of the Fifth Amendment Double Jeopardy Clause.

The *same transaction* theory does not furnish courts with a manageable judicial standard for application of the Double Jeopardy Clause. As stated by John Lobur

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> This statute was before this court in the case of *Kepner v. United States,* 195 U.S. 100, and it was there held that *the protection against double jeopardy* therein provided had, by means of this statute, *been carried to the Philippine Islands in the sense and in the meaning which it had obtained under the Constitution and laws of the United States.*" See *Gavieres, supra,* at 341. (Emphasis added.)

The *Cousins* Court *supra* at 831, footnote 4 wrote:

> "*Gavieres* involved a statutory double jeopardy prohibition applicable to the Philippine Islands, but the Court stated that the statute had the same meaning as the constitutional protection against double jeopardy, 220 U.S. at 341, 31 S.Ct. 421. And *see Kepner v. United States,* 195 U.S. 100, 121-124, 24 S.Ct. 797, 49 L.Ed. 114 (1904)."

in a WAYNE LAW REVIEW article criticizing the same transaction doctrine:

> "*When will all . . . acts be part of the same transaction*? When viewed together, the very terms *'act' and 'transaction' seem to defy separate definition.* If a 'single intent' is the factor which ties together several acts and makes them all part of the same transaction, pretrial determinations of an individual's state of mind would be necessary. Finding the single intent would, however, be speculative at best. The requirement of a single intent would also cause confusion in situations involving the same facts as the princpal case but occurring in a different sequence. For example, if defendant had first kidnapped his victim, then raped her (thus fulfilling his 'single intent' of having intercourse with her), and, as an afterthought, beat her, could the assault be said to have been done with the 'single intent' of having intercourse?" *Criminal Procedure—The Same Transaction Test—Is It Really Double Jeopardy?*, 20 WAYNE L. REV. 1377, 1378 (1974). (Emphasis added.) *See also*, Comment, *Twice In Jeopardy*, 75 YALE L. JOURNAL 262, 276 (1965).[21]

21. *See also*, 20 WAYNE LAW REVIEW 1377, 1378, footnote 6.

"Reprosecution and multiple punishment will be barred if the defendant's conduct constituted a single act or transaction, or was motivated by a single intent. The principal shortcoming of this approach is that any sequence of conduct can be defined as an 'act' or a 'transaction.' An act or transaction test itself determines nothing . . . Whether any span of conduct is an act depends entirely upon the verb in the question we ask. A man is shaving. How many acts is he doing? Is shaving an act? Yes. Is changing the blade in one's razor an act? Yes. Is applying the lather to one's face an act? . . . Yes, yes, yes.

. . . And since the term 'transaction' is equally chameleonic, it is not shocking that in Georgia, a so-called transaction state, two offenses do not constitute one transaction unless the offenses are the same in law and fact. Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 276 (1965) (footnote omitted)"

The American Law Institute's proposal, relied on by Petitioner Brown, does not furnish Courts with a manageable judicial standard for delineating the outer boundaries of a single transaction, and therefore it does not suitably clarify the inherent ambiguity in the "same transaction" theory of the Double Jeopardy Clause. The A.L.I.'s standard is *vague* because it is based on words "arising from the same criminal episode." Who knows what a criminal episode is? Furthermore, the standard purports to be limited by a restriction that the multiple offenses within the episode must be known to the prosecuting authority at the time of commencement of the first trial. The State of Ohio recognizes that for purposes of double jeopardy, political subdivisions of a single state compose one sovereign.[22] However, the distinction between political subdivisions of the State, in Brown's case, the distinction between Lake County's Willoughby Municipal Court and Cuyahoga County's Grand Jury, has serious implication for the determination of whether an initial prosecuting authority has knowledge of all offenses which may be embraced within a particular criminal episode.

The record in this case contains no evidence that the Lake County prosecuting authorities, at the time Brown was initially convicted for the misdemeanor of operating a vehicle without the owner's consent, had the slightest reason to believe that Brown had committed the felony of auto theft by entering the different jurisdiction of Cuyahoga County and stealing an auto there.[23] The record certainly does not indicate that the Lake County authorities had reason to believe that Brown resided in Cuyahoga County, or that he ever visited that county. Assuming

22. See, *Waller v. Florida*, 397 U.S. 387, 395 (1970).

23. See discussion in the State of Ohio's Brief at footnote 1 *supra*.

that the Lake County authorities knew that the auto was stolen nine days before the day Brown plead guilty in the Lake County Municipal Court[24] there is nothing in the record which would put the Lake County authorities on notice that Brown entered Cuyahoga County, or any other county, and stole the automobile. Presumably relying on the single sovereign doctrine of *Waller v. Florida*, 397 U.S. 387, 395 (1970), Petitioner Brown urges this Court to infer that the Lake County authorities knew of Brown's prior misdeeds in Cuyahoga County nine days before his conviction in Lake County. Thus Petitioner Brown argues:

> "If the State wished to prosecute Petitioner for auto theft occurring on November 29th and joyriding occurring on December 8th, 1973, they should have done so at their first opportunity and at one trial. They had such an opportunity in the Willoughby Municipal Court in Lake County on December 8, 1973." Petitioner Brown's Brief, page 15.

If this Court permits the *Waller* doctrine to trigger *inferred knowledge* on the part of an initial prosecuting authority of each individual criminal act, which arguably comprises a single continuous transaction, when the different individual crimes are committed in multiple political subdivisions of a single state, then frequently states will be precluded from punishing serious violations of their criminal statutes merely because the initial prosecuting authority expeditiously tried the defendant for the last criminal act without searching the State to establish the conceptual time and space parameters within which the crime occurred.

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24. An assumption which is nowhere documented in the record.

For example, a defendant could commit vehicular homicide in front of a police officer walking a beat, who took the defendant's license number in Cuyahoga County, Ohio. The defendant could then speed away from the scene of the death, into Lake County, and there receive a speeding ticket fifteen minutes after the death. Under the A.L.I.'s rule, as applied by Petitioner Brown, such a defendant could quickly plead guilty to speeding in a Lake County Court and claim immunity from prosecution for vehicular homicide on the ground that he was speeding in Lake County in order to escape detection by the Cuyahoga County authorities. He would then argue that his Lake County speeding conviction was within the same transaction as the vehicular homicide. Such a defendant would then urge that the "State" should have proceeded against him at one trial because its political subdivisions constitute a single sovereign for Double Jeopardy purposes, *Waller, supra*, and therefore, the sovereign state, as the appropriate prosecuting authority, knew of *both* offenses at the time of the first conviction.

The State of Ohio respectfully suggests that the Double Jeopardy Clause is not designed to generate the type of immunity which logically flows from the application of the same transaction theory to legitimate, serial prosecutions for unique offenses which are limited by the fortuity of space or time.[25] See *Ashe v. Swenson*, 397 U.S. 436, 468-70 (1970) (Chief Justice Burger dissenting).

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25. Of course, it is possible to read the A.L.I. rule to protect defendants from subsequent prosecutions *only* when the initial "prosecuting officer" knows of the prior crimes within the single transaction. This approach might avoid the problems which the single sovereign doctrine of *Waller* cause for the A.L.I. rule. However, such an approach to the A.L.I. rule furnishes no protection to Brown since the "prosecuting officer" in Lake County, absent an inference of knowledge based on the *Waller* doctrine, could have no idea what prior offenses Brown had committed in Cuyahoga County at the time Brown plead guilty in Lake County.

(C) The American Law Institute's Same Transaction Rule Unnecessarily Burdens Trial Courts by Requiring Extensive Pre-Trial Hearings on Factual Issues Which Are Unrelated to Determinations of Factual Guilt, and Will Further Plague Federal Courts in Habeas Corpus Proceedings on Issues Unrelated to Determinations of Factual Guilt.

Under the A.L.I.'s same transaction rule the determination of what constitutes a criminal episode that was *known* to the initial charging authority requires a factual determination by the trial court in the second trial of what facts the initial charging authority had when it prosecuted the defendant in the first trial. This factual determination can be made only by imposing an onerous burden on States to conduct pre-trial hearings in order to fathom the propriety of a second trial which is arguably concerned with the same criminal episode that was the subject of some prior litigation. See 20 WAYNE L. REV. 1377, 1378 (1974). A pre-trial hearing on issues unrelated to the validity of guilt determining, would thus be necessitated at all second trials, similar to the burdensome pre-trial factual inquiries currently mandated under *Mapp v. Ohio*, 367 U.S. 643 (1961). The record does not show any factual determination in Petitioner Brown's case, because the State has not been afforded the opportunity to show what facts were within the grasp of the initial charging authority. Therefore, if this Court adopts the A.L.I.'s single transaction Double Jeopardy rule in Brown's case it must make one of two additional procedural rulings:

(1) Remand for hearing. Also determine what the burden of proof in such a hearing should be, and who has the burden of proof in such a hearing; or

(2) Deny the Petitioner's double jeopardy claim because Brown has not carried his burden to cultivate a record of the facts that were within the grasp of the initial charging authorities in this case; i.e., the Lake County authorities.

The pre-trial hearing procedures which flow *a fortiori* from the A.L.I.'s same transaction rule (i.e., §1.07(2)), will plague the federal judiciary with relitigation of factual matters, unrelated to guilt determinations, in collateral attacks in Federal Habeas Corpus. Such an approach to the administration of criminal justice burdens federal-state comity, and has been severely criticized in recent years,[26]

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26. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Chief Justice Burger dissenting), the Chief Justice criticized the *Mapp* rule when he wrote:

> "For more than 55 years this Court has enforced a rule under which evidence of undoubted reliability and probative value has been suppressed and excluded from criminal cases whenever it was obtained in violation of the Fourth Amendment. *Weeks v. United States*, 232 U.S. 383 (1914); *Boyd v. United States*, 116 U.S. 616, 633 (1886) (dictum). This rule was extended to the States in *Mapp v. Ohio*, 367 U.S. 643 (1961). The rule has rested on a theory that suppression of evidence in these circumstances was imperative to deter law enforcement authorities from using improper methods to obtain evidence.
>
> The deterrence theory underlying the suppression doctrine, or exclusionary rule, has a certain appeal in spite of the high price society pays for such a drastic remedy. Notwithstanding its plausibility, many judges and lawyers and some of our most distinguished legal scholars have never quite been able to escape the force of Cardozo's statement of the doctrine's anomalous result:
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> > "The criminal is to go free because the constable has blundered. . . . A room is searched against the law, and the body of a murdered man is found. . . . The privacy of the home has been infringed, and the murderer goes free." *People v. Defore*, 242 N. Y. 13, 21, 23-24, 150 N. E. 585, 587, 588 (1926).
>
> The plurality opinion in *Irvine v. California*, 347 U.S. 128, 136 (1954), catalogued the doctrine's defects:
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> > "Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It deprives society of its

(Footnote continued on following page)

and conflicts with the recent trend in this Court limiting state prisoner's use to Federal Habeas Corpus to reverse their convictions on factual grounds unrelated to the validity of guilt determining.[27]

(D) The Eighth Amendment Protection Against Cruel and Unusual Punishment Shields Defendants From Excessively Severe Sentences Which May Inflict Disproportionate Punishment for a Course of Criminal Conduct.

Petitioner Brown argues that if this Court does not adopt the A.L.I.'s same transaction rule then he:

> ". . . depending upon the whim of the prosecutor, could have faced a total of ten charges—each at a separate trial after having served a sentence imposed in an antecedent trial. The penalty provisions for 'joyriding' are a maximum six-month term for the first offense and a maximum twenty-year term for each repeat offense. Ohio Rev. Code 4549.99(E). Consequently, even if the State were satisfied with charging only

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> remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches." *Bivens, supra* at 412-413.

Ultimately the Chief Justice says that he rejects the *Mapp* type approach to the administration of criminal justice. See *Stone v. Powell*, ... U.S. ....., ..., 49 L.Ed.2d 1067, 1091 (1976) (Chief Justice Burger, Concurring). Obviously the pre-trial hearings and factual determinations necessitated by the A.L.I.'s §1.07(2) rule cannot be justified on the theory that they deter initial prosecuting authorities from quickly trying defendants without thoroughly investigating the scope of the whole transaction of related crimes. We can expect law enforcement officers to make such inquiries with or without a same transaction rule.

27. See *Stone v. Powell*, ... U.S. ....., ..., 49 L.Ed.2d 1067, 1084, 1088 (1976).

> the lesser offense of 'joyriding' at each of the ten prosecutions, Petitioner would be subject to a total penalty of 180 years and six months in the state penitentiary.
>
> To afford Petitioner at least the partial protection of knowing his total period of confinement at one time, this Court must adopt the rule advocated by writers, the American Law Institute. . ." Petitioner Brown's Brief at 17.

Referring in part to the potentially disproportionate sentencing to which he is exposed, Brown concludes that, "[t]here is no protection for Petitioner other than the *same transaction* test." Petitioner Brown's Brief at 18.

However, Brown exaggerates the potential disporportionate punishment and unfair treatment to which he is exposed. He was not treated arbitrarily,[28] or sentenced

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28. Brown's case is not a situation where a prosecutor sought repetitive reprosecution on one charge in an effort to achieve the penalty he feels is proper. The second trial was not a matter of a prosecutor playing his "ace in the hole" after an unsatisfactory verdict nor do we find criminal prosecution employed as a means to harass the accused or inflict unnecessary suffering. The inconvenience of the second trial on the theft charge is granted, but harassment is not synonymous with inconvenience.

The Court is confronted with a conviction of an individual on two different offenses as defined by the Ohio Legislature. The interest of the people of Ohio in the enforcement of their criminal laws would be ill-served were the instant case to be governed by a strained analogy to a situation where an overzealous prosecutor seeks relitigation of a criminal matter due to his own mistakes or his dissatisfaction with a verdict. Such a conviction does not violate the fundamental fairness notions implicit in due process of law.

This Court should also remember that the same transaction test is not a rule that necessarily expands the Double Jeopardy protections of criminal defendants. Under *Ashe v. Swenson*, 397 U.S. 436, 443-47 (1970) a defendant who is *acquitted* at his first trial may not be retried subsequently for an offense, the elements of which necessarily were resolved in his favor at his first trial.

(Footnote continued on following page)

disproportionately.[29] Assuming, without admitting, that Brown has standing to claim, in support of his view of the same transaction Double Jeopardy test, that he is subject to unconstitutional multiple sentencing which is severely disproportionate to the total criminal conduct in which he engaged, this Court must reject his Double Jeopardy, excessive punishment argument. A criminal defendant who receives a prison sentence which is grievously excessive when compared with the nature of the criminal conduct for which he was convicted may claim that his punishment is so disproportionate that it violates the Eighth Amendment to the United States Constitution. See, *Downey v. Perini,* 518 F.2d 1288, 1290-92 (6th Cir., 1975) (Invalidating a sentence of 30 to 60 years for the sale of a "small" quantity of marijuana), *remanded on other grounds* 423 U.S. 993 (1975); *Hart v. Coiner,* 483 F.2d 136, 141-143 (4th Cir., 1973) (Invalidating Life Sentence,

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If this Court adopts a restrictive definition of when multiple offenses are contained in the same transaction, then arguably a defendant who is tried and *acquitted* at his first trial, and who might be protected from a subsequent trial by the *collateral estoppel doctrine* of *Ashe, supra,* may find himself subject to a second trial on the theory that the offense for which he is to be tried at the second trial fell outside the same transaction involved in the first trial.

For example, on the facts of Petitioner Brown's case, had he been acquitted by a jury at his first trial for the misdemeanor of operating a motor vehicle without the owner's consent, and if that misdemeanor offense is a lesser included offense of the felony of auto theft, the *Ashe,* Double Jeopardy, collateral estoppel doctrine might bar his second trial for the felony of auto theft. However, should this Court adopt a same transaction Double Jeopardy approach, then Brown, in this hypothetical example, might well be subject to a second trial on the felony, despite his first acquittal, on the theory that the two offenses occurred in two separate transactions, separated by nine days.

29. Brown was sentenced to 30 days in jail by the Lake County Municipal Court, *see* Appendix page 4, and one year of probation by the Cuyahoga County Common Pleas Court, *see* Appendix page 15.

under a recidivist statute, for passing bad checks), *cert. den.* 415 U.S. 938 (1974), *reh. den.* 416 U.S. 916 (1974).

The Eighth Amendment approach to the problems of disproportionate sentencing which may occur under the current, constitutionally recognized, same evidence rule is more salutory than the expansionist same transaction rule urged by Petitioner Brown. The Eighth Amendment approach avoids the necessity of *pre-trial* hearings on factual issues unrelated to guilt determining and subsequent federal habeas corpus collateral review of those factual determinations. At the same time, the Eighth Amendment approach accommodates society's important legitimate interest in factually establishing a defendant's violation of its criminal provisions and furnishes the trial court, *after factual guilt* has been affirmatively established, an opportunity to vitiate the problem of disproportionate sentencing by ordering that the defendant serve his sentences concurrently.

Consequently, Petitioner Brown's same transaction test is not the "only protection" available to criminal defendants faced with serial convictions for separate criminal acts, and it is not the most functional approach to striking a balance between the state's legitimate interest in vindicating their criminal laws and defendant's interests in protection against disproportionately severe punishments.

CONCLUSION

The judgment of the Ohio Court of Appeals should be affirmed.

Respectfully submitted,

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